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HONOR ROLL

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434th Session, Basic Law Enforcement Academy - June 1 through August 23, 1995

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BRIEF NOTES FROM THE WASHINGTON STATE SUPREME COURT

(1) **STATE CONSTITUTION'S DOUBLE JEOPARDY CLAUSE NO BROADER THAN FEDERAL CONSTITUTION'S CLAUSE--TEST IS WHETHER CRIMES CONTAIN SAME ELEMENTS** -- In State v. Gocken, 127 Wn.2d 95 (1995), a 7-2 majority of the State Supreme Court rejects double jeopardy arguments put forward by defendants in two unrelated cases, consolidated on appeal to address the double jeopardy issue presented in each case.

Gocken circumstances: Defendant Gocken had been charged with possession of drug paraphernalia and with possession of a controlled substance with intent to deliver. The two charges were in relation to one incident. After Gocken had pleaded guilty in district court to the gross misdemeanor drug paraphernalia charge, he moved in superior court on double jeopardy grounds for dismissal of the felony drug possession charge; his motion was granted. The State appealed to the Court of Appeals for Division III, and the Court of Appeals reversed, holding that double jeopardy protections did not bar the prosecution in superior court.

Crisler circumstances: Defendant Crisler had been charged with criminal conspiracy and with second-degree theft. The two charges were in relation to one incident. After Crisler had pleaded guilty in district court to the gross misdemeanor conspiracy charge, he moved in superior court on double jeopardy grounds for dismissal of the felony theft charge; his motion was denied and he was subsequently convicted by a jury of second-degree theft. He appealed to the Court of Appeals for Division III, and the Court of Appeals affirmed, finding no violation of double jeopardy protections.

Five members of the State Supreme Court join an opinion authored by Justice Guy holding: (1) that the State and Federal constitutional double jeopardy protections are identical; (2) that the test for double jeopardy in the context of these cases is whether the same elements are found (A) in the first crime on which there is a conviction, guilty plea, acquittal, or similar disposition of the case, and (B) in the second crime charged; and (3) in the Gocken and Crisler cases, the elements were not the same, so the second charge in each case should not have been dismissed.

Justice Madsen writes a concurring and dissenting opinion in which she agrees with the result reached by the majority, but in which she argues for a different and more liberal (pro-defendant) standard under the state constitution. Justice Johnson writes a dissenting opinion joined by retired Justice Utter (acting pro-tem) also arguing that the state constitution contains a more liberal standard, and asserting that, while Gocken's double jeopardy rights were not violated,

Crisler's were.

Result: Spokane County Superior Court order dismissing the drug possession charge against Gocken reversed; case remanded for trial. Crisler's conviction of second-degree theft in Douglas County Superior Court affirmed.

(2) **LACK OF PREVIOUS POLICE CONTACTS NOT A MITIGATING FACTOR FOR SENTENCING PURPOSES UNDER SRA** -- In State v. Freitag, 127 Wn.2d 141 (1995) the State Supreme Court rules in a vehicular homicide case that a defendant's lack of a criminal record or prior police contacts does not constitute a mitigating circumstance under the Sentencing Reform Act (SRA -- chapter 9.94A RCW). Justice Madsen writes a lone dissenting opinion arguing for a more liberal standard which would allow the mitigation argument which had been accepted by the trial court in Angela Freitag's case, but is rejected by the Supreme Court majority. LED EDITOR'S NOTE: Readers wishing to look at a brief, but fairly comprehensive, listing of SRA aggravating and mitigating circumstances rulings by the State Supreme Court over the past decade will want to read Justice Madsen's dissent.

Result: Reversal of King County Superior Court decision sentencing Freitag to community service instead of jail time; case remanded for re-sentencing to jail time under the SRA (90 days minimum).

(3) **RIVAS'S INTERPRETATION OF VEHICULAR HOMICIDE STATUTE APPLIED** -- In State v. Salas, 127 Wn.2d 173 (1995) the State Supreme Court rejects a vehicular homicide defendant's challenge to his conviction. One of the defendant's several grounds on appeal was that the jury should have been instructed in conformance with the ruling of State v. MacMaster, 113 Wn.2d 226 (1989)[113 Wn.2d 226 (1989) **Dec. '89 LED:14]**, a State Supreme Court decision which had held that there was an implied nonstatutory element of a causal connection between intoxication and death in the vehicular homicide statute.

In State v. Rivas, 126 Wn.2d 443 (1995) **August '95 LED: 12**, the State Supreme Court ruled that 1991 legislative amendments to the vehicular homicide statute (RCW 46.61.520) in effect legislatively overruled MacMaster and eliminated the intoxication-death-causation requirement in vehicular homicide prosecutions. The Salas Court holds that Rivas controls the case before it; the Court also rejects challenges by defendant to the sufficiency of the evidence and to other aspects of the trial court's jury instructions.

Result: reversal of Division III Court of Appeals ruling that had reversed a Grant County Superior Court conviction for vehicular homicide based on MacMaster case; Superior Court conviction and judgment reinstated.

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BRIEF NOTES FROM THE WASHINGTON STATE COURT OF APPEALS

(1) **SUBJECTIVE BELIEFS OF OFFICER RE PERSONAL SAFETY RISKS CONSIDERED RELEVANT IN TESTING LAWFULNESS OF PROTECTIVE FRISK** -- In State v. Courtier, 78 Wn. App. __ (Div. III, 1995) the Court of Appeals holds that a frisk made without probable cause to arrest, based on the stop-and-frisk rule of Terry v. Ohio, may not be upheld as a protective search unless the searching officer had both (1) a subjective belief and (2) objective grounds to

believe that the search was necessary for officer-safety purposes.

In Courtier, following a traffic stop for defective equipment, a law enforcement officer directed the driver to open the vehicle's glove box to look for registration and insurance papers. The driver tried to position his body while he opened and closed the glove box so that the officer could not see inside, but the officer caught a glimpse of a plastic baggie which he had a suspicion (but apparently not probable cause to believe) might contain marijuana. The officer directed the defendant to re-open the glove box, and the officer retrieved what proved to be a baggie of marijuana.

In a pre-trial suppression hearing, the officer testified that, at the time of the stop,he was not concerned about his personal safety in relation to the defendant. Based on the officer's testimony in this regard, and on his failure to take any measures indicating a concern for safety (e.g. drawing a weapon), the trial court concluded that the officer's motive in directing the non-consensual re-opening of the glove box was not officer safety, but discovery of contraband.

However, the trial court went on to consider the furtive gestures of the defendant when he had attempted, by moving his body between the officer's flashlight beam and the interior of the glove box, to block the officer's view of the contents of the glove box. The trial court concluded that these furtive gestures would have given a reasonable officer grounds to fear for his safety, and that this objective rationale for a protective search of the glove box justified the officer's conduct, regardless of the officer's subjective motive.

In reversing the trial court ruling, the Court of Appeals asserts that the leading U.S. Supreme Court case rejecting consideration of subjective motives of officers in search and seizure cases-- Scott v. United States, 436 U.S. 128 (1978)-- has not been cited in Washington cases involving protective searches. In addition, the Court of Appeals claims, in recent years Washington courts reviewing vehicular searches on officer-protection grounds have generally considered both subjective and objective elements of the facts.

After citing recent court decisions (See State v. Terrazas, 71 Wn.App. 873 (1993), State v. Feller, 60 Wn.App. 678 (Div. III, 1991) **July '91 LED:08**, and State v. Sistrunk, 57 Wn.App. 210 (Div. III, 1990) **Sept. '90:10**), which purportedly took the subjective component into account in evaluating the lawfulness of a protective vehicle search, the Court of Appeals asserts:

> It is difficult to see how the subjective component could be wholly eliminated. The officer's perception of events, what he observed and how he interpreted it, why he reacted as he did, are all subjective in nature and set the stage for determining whether his reaction was objectively reasonable. Imposing a threshold subjective test impedes legitimate safety searches only marginally, if at all, and does not do violence to the proposition that ultimately, the question hinges on objective reasonableness.

The Court of Appeals concludes its analysis on the officer-safety issue by pointing out that the officer in question had 19 years of experience and saw no cause for alarm, and that "[t]here is no basis in the record for concluding a hypothetical reasonable officer would have reacted differently."

The Court of Appeals also rejects a "consent search" argument by the State to the effect that the

defendant opened the glove box voluntarily.

Result: Grant County Superior Court conviction for possession of a controlled substance reversed; charge dismissed. Status: State's petition for review filed 8/28/95.

LED EDITOR'S COMMENTS:

(1) Division III is wrong. There is no "subjective" element to the Fourth Amendment standard against which officers' decisions to frisk are measured. Division III's Courtier opinion is grounded entirely in the Fourth Amendment of the U.S. Constitution. In no way can it be read as an "independent grounds" ruling under the Washington constitution, and hence it has no doctrinal foundation other than the Fourth Amendment. As a Fourth Amendment decision, Courtier must, under the federal constitution's supremacy clause, conform to what the U.S. Supreme Court has determined the standard to be.

The U.S. Supreme Court applies solely an objective test (looking at search and seizure issues in terms of what a reasonable officer would do under the circumstances) to Fourth Amendment issues of this sort. See, for example, Maryland v. Buie, 494 U.S. 325 (1990) May '90 LED:02 (applying a purely objective test to determine the lawfulness of an arrest team's decision to do a "protective sweep" of an arrestee's residence for personal safety reasons). Courtier may or may not be the best case to test the activist Division III's views in this regard. We would hope that prosecutors will not accept this distortion of the Fourth Amendment case law, and that they will fight the good fight on this issue in future cases.

Even the leading academic commentator, Professor LaFave, acknowledges in his "Search and Seizure" treatise that with respect to the frisk decision "[t]he test is an objective rather than a subjective one, just as with the probable cause needed to arrest or search and thus it is not essential that the officer actually have been in fear." 3 LaFave, § 9.4, page 504-505. See also LaFave's other discussion of Fourth Amendment case law generally rejecting a subjective test on search and seizure questions. LaFave at § 1.4 (discussing general Fourth Amendment rule); §3.2(b) (discussing rule for probable cause determinations); and § 9.2(e) (discussing rule for "reasonable suspicion" determination under Terry v. Ohio).

(2) Having said the foregoing, we must accept the fact that officers can anticipate being subjected to this arguably improper line of questioning. When officers are subjected to questioning in a suppression hearing, officers of course must "tell it like it is," relying on their reports and memory to describe the incidents at issue. However, in addition, officers should anticipate that defense counsel pursuing the subjective element of their decisions to frisk will try to lead the officers into bravado declarations to the effect that they weren't concerned for their safety with regard to this particular defendant. If defense counsel is allowed by the court to pursue such a line of questioning, then officers should be prepared to conduct a little officer-safety training course on the spot; i.e., explaining that officer-safety considerations must always be foremost in an officer's mind.

(2) **"NECESSITY" CAN BE DEFENSE FOR FELON POSSESSING GUN, BUT NOT IF POSSESSION BEGINS BEFORE NECESSITY ARISES AND CONTINUES WITHOUT BREAK UNTIL POINT THAT NECESSITY ARISES** -- In State v. Jeffrey, 77 Wn. App. 222 (Div. III, 1995) the Court of Appeals accepts defendant's argument that there can be a defense of "necessity" for a felon found in possession of a firearm, but the Court goes on to hold that the defense does not

apply under the facts of this case.

Answering a question of first impression in Washington, the Court of Appeals relies on federal case law in adopting the following definition of a "necessity" defense for a felon found in otherwise illegal possession of a firearm. The defendant asserting this defense must demonstrate:

> (1) he was under unlawful and present threat of death or serious injury, (2) he did not recklessly place himself in a situation where he would be forced to engage in criminal conduct, (3) he had no reasonable alternative, and (4) there was a direct causal relationship between the criminal action and the avoidance of the threatened harm.

[Citations omitted]

The facts of Jeffrey's case are described by the Court of Appeals as follows:

> Mr. Jeffrey and his wife Kathy Jeffrey were at home in East Wenatchee on the evening of May 18, 1992. At approximately 11:30 p.m., Mrs. Jeffrey looked out of her kitchen window and saw the face of what she thought was a young Hispanic male. Startled, Mrs. Jeffrey woke her husband who told her to call the police. Deputy Button of the Douglas County Sheriff's office responded and searched the surrounding area. He found a young Hispanic male in the neighborhood, but Mrs. Jeffrey was unable to identify him as the person she saw.
>
> Shortly after Deputy Button departed, Mr. Jeffrey called a friend named Dale Yarbrough. He came to the Jeffreys' home and stayed about 1 hour. When he left, he placed a .45 mm Llama handgun under their couch. An hour after he departed, the Jeffreys heard noises outside their bedroom window. Mr. Jeffrey saw a silhouette outside the window, retrieved Mr. Yarbrough's gun from under the couch, and fired a shot through the headboard of the bed. He then told his wife to call the police again. When Deputy Button returned, he found Mr. Jeffrey in his bedroom with the gun in his hand.

Turning to its interpretation of the "necessity" defense, the Court of Appeals explains why it believes that the trial court correctly rejected the defense in Jeffrey's case:

> Mr. Jeffrey argues the trial court erred in ruling there was no evidence he was under necessity. The trial court found Mr. Jeffrey was in constructive possession of the gun before he came under any possible threat. Constructive possession is established by examining the totality of the situation and determining if there is substantial evidence from a which a jury can reasonably infer the defendant had dominion and control over the item. . . . Factors which point to dominion and control include knowledge of the illegal item on the premises and evidence of residency or tenancy. . . .
>
> There was sufficient evidence to show Mr. Jeffrey had constructive possession of the gun. He knew the gun was under the couch in his own home. He testified he armed himself with the gun after he saw a silhouette in the window. There was no verification of an individual actually lurking outside the house. Even if there had been a person outside, there was no evidence he or she was capable of

> immediately entering the home or in any way posed a threat of imminent serious bodily injury or death to the Jeffreys. Finally, the Jeffreys' phone call to the police was, by itself, an adequate alternative, especially since Officer Button quickly responded to their first call. The trial court properly denied the proposed instructions as unsupported by the evidence.

[Citations omitted]

Result: Douglas County Superior Court conviction under RCW 9.41.040 affirmed.

(3) **NARCOTICS DETECTIVE ALLOWED TO TESTIFY GENERALLY ABOUT HEROIN USERS, DEALERS, ENVIRONMENT --** In State v. Cruz, 77 Wn. App. 811 (Div. I, 1995) the Court of Appeals rules that the trial court committed no error in allowing a narcotics detective, who had no involvement in defendant Cruz's case, to testify generally as an expert about heroin users, heroin transactions, and the Seattle heroin market.

The Court of Appeals briefly describes the expert testimony and Cruz's challenge to it as follows:

> The trial court permitted the State to call Detective Glenn Edmondson of the King County Police Department Drug Enforcement Unit to testify about "typical" heroin transactions. Detective Edmondson was neither involved in the controlled buy at issue here, nor was he familiar with Fay or Cruz. At the time he testified, Detective Edmondson had been a member of the drug enforcement unit for 10 years and had been involved in 500 to 600 undercover investigations, the majority of which involved heroin. His testimony consisted of responses to the following questions: (1) What does heroin look like? (2) How much is typically involved in a transaction? (3) How and with what implements is heroin ingested? (4) Is heroin a social drug? (5) Do police officers in a heroin investigation usually work undercover alone? (6) Why are informants used in heroin investigations? (7) What is a controlled buy? (8) Where do heroin transactions commonly take place? (9) Why do they usually take place in public areas? (10) Why is it common for a heroin supplier to hide the drugs outside? (11) How does a typical heroin transaction proceed after the parties agree to meet? (12) Did the detective gain his knowledge of heroin transactions from personal experience?
>
> Cruz contends the trial court erred by admitting this testimony because, when coupled with the prosecutor's closing argument in which he argued that Cruz's actions fit within the detective's description of a typical heroin transaction, the testimony constituted an improper opinion about Cruz's guilt.

[Footnote omitted]

The Court of Appeals thoroughly analyzes Cruz's challenge and concludes that the trial court committed no error in permitting the expert testimony and closing argument under the facts of this case.

Result: King County Superior Court conviction for delivery of a controlled substance affirmed.

(4) **OFFICER'S OPINION THAT DEFENDANT "WAS THE ONE RUNNING THE SHOW" NOT**

IMPERMISSIBLE OPINION AS TO DEFENDANT'S GUILT AS AN ACCOMPLICE -- In State v. Fisher, 74 Wn. App. 804 (Div. I, 1994) the Court of Appeals rejects defendant's argument that the trial court erred in his drug case by allowing an officer to testify that defendant "was the one running the show." The State's case was based on accomplice liability arising out of a drug deal where defendant had escorted undercover police officers to the seller's home.

The Court of Appeals explains as follows the evidence law principles governing this question:

> Under ER 704, opinion testimony is not required to be excluded merely because it encompasses an ultimate issue of fact to be decided by the factfinder. Seattle v. Heatley, 70 Wn. App. 573 (1993) **[March '94 LED:11]**. However, no witness, lay or expert, is allowed to "'testify to his opinion as to the guilt of a defendant, whether by direct statement or inference.'" It is often said that such testimony is unfairly prejudicial because it invades the trier of fact's province to independently evaluate the facts. Furthermore, an opinion as to the defendant's guilt is particularly prejudicial when made by a law enforcement official.
>
> In Heatley, this court held that the determination of whether testimony constitutes an impermissible opinion as to the defendant's guilt:
>
> > . . . will generally depend on the specific circumstances of each case, including the type of witness involved, the specific nature of the testimony, the nature of the charges, the type of defense, and the other evidence before the trier of fact. The trial court must be accorded broad discretion to determine the admissibility of ultimate issue testimony, and this court has expressly declined to take an expansive view of claims that testimony constitutes an opinion on guilt.
>
> Courts have held that evidence does not constitute improper opinion testimony when the testimony is not a direct comment on the defendant's guilt or on a witness's veracity, is helpful to the jury, and is based on inferences from the evidence. Heatley, at 577-80 **[March '94 LED:11]** (holding that the officer's testimony that the defendant was "'obviously intoxicated'" and '" could not drive a motor vehicle in a safe manner. . .'" did not constitute an opinion about the defendant's guilt on a DWI charge because the opinion was based solely on his experience and his observation of Heatley's physical appearance and performance on field sobriety tests). . .
>
> In this case, although Alphin's testimony encompassed the ultimate factual issue as to whether Fisher acted as an accomplice to the delivery and to possession with the intent to deliver, Alphin did not express a direct opinion as to Fisher's guilt or his credibility. Alphin's opinion that Fisher's statement during the transaction indicated that he was "involved in the transaction" or "running the show" was an inference drawn, not only from his experience with street-level drug sales, but from having personally heard Fisher's statement and observed his behavior. Here, even without expert testimony about drug transactions, this inference is one that would be drawn by any reasonable person. We therefore find that Alphin's testimony did not constitute an impermissible opinion as to Fisher's guilt.

[Some citations omitted]

Result: King County Superior Court conviction for being an accomplice to delivery of a controlled substance (count one) affirmed; conviction as accomplice to delivery of a controlled substance (count two) reversed; case remanded for suppression hearing on a search and seizure issue not addressed substantively by the Court of Appeals.

(5) **UNDER FORMER LAW, JUVENILE OFFENSE ADJUDICATION AS "FELONY WITH SEXUAL MOTIVATION" DIDN'T REQUIRE THAT JUVENILE REGISTER AS SEX OFFENDER** -- In State v. S.M.H., 76 Wn. App. 550 (Div. I, 1995) the Court of Appeals rules that, due to an apparent legislative oversight in drafting the former sex offender registration statute, a "felony with sexual motivation" by a juvenile (RCW 13.40.135) did not constitute a "sex offense" under former RCW 9.94A.030(31). Therefore, a juvenile convicted of a "felony with sexual motivation" (as opposed to a juvenile convicted of a "sex offense") was not required to register as a sex offender under 9A.44.130 prior to 1995 amendments to the applicable laws. Result: King County Superior Court order to juvenile to register as a sex offender stricken. **LED EDITOR'S NOTE: Section 2 of chapter 268, Laws of 1995, amended RCW 9.94A.030 to cross reference "RCW 13.40.135" in the definition of "sex offense." This change appears to cure the problem in the S.M.H. case. The law now requires registration by juveniles adjudicated guilty of felonies where there is a finding that the felony was committed "with sexual motivation."**

(6) **UCSA "SCHOOL ZONE" LAW APPLIES EVEN IF SCHOOL IS LOCATED ON THIRD FLOOR OF URBAN BUILDING, AND THEREFORE HAS NO PLAYGROUND OR LANDSCAPING** -- In State v. Shannon, 77 Wn. App. 379 (Div. I, 1995) the Washington State Court of Appeals rejects defendant's appeal from his sentence enhancement under the Uniform Controlled Substances Act.

The Court holds that, for purposes of RCW 69.50.435(a), which authorizes increased punishment for a person convicted of certain controlled substances crimes that take place within 1,000 feet of the perimeter of school grounds, "school grounds" consists of the school's physical plant and appurtenant property. The statutory zone of protection applies even where, as here, the downtown Seattle grade school was located in its entirety on the third floor of an office building and lacked an appurtenant playground or landscaping.

The Court explains the rationale of its ruling by noting that the purpose of increasing punishment for a person convicted of a controlled substances crime that takes place within 1,000 feet of the perimeter of school grounds (RCW 69.50.435(a)) is to discourage the development of violent and destructive drug culture in areas where there are children.

Result: King County Superior Court VUCSA conviction (delivery) and enhanced sentence for school zone violation affirmed.

(7) **FEAR OF HARM WHICH FOLLOWS AN ATTACK MAY BE AN ELEMENT OF "ASSAULT"** -- In State v. Ratliff, 77 Wn. App. 522 (Div. I, 1995) the Court of Appeals reviews the definition of "assault" and rejects defendant's assertion that his act of throwing urine in the face of a correctional officer did not constitute an assault under one of the variations of "assault".

The Court of Appeals notes that Title 9A RCW does not supply a definition of "assault", so resort to the common law definition of the term is necessary. At common law, there are three variations

of assault. In the Ratliff case, the trial court gave jury instructions on two of the variations, as follows:

> 1. An assault is an intentional touching or striking of the person or body of another, regardless of whether any actual physical harm is done to the other person.
> *2. An assault is also an intentional act, with unlawful force, which creates in another a reasonable apprehension and fear of bodily injury even though the actor did not actually intend to inflict bodily injury.*

(Italics added) **[LED EDITOR'S NOTE: The third variation of common law assault, the one not given in the jury instructions and hence not looked at in this case, involves an *attempt* at the first variation set forth above. Note also that there was no question under the facts of this case that Ratliff's act was an "assault" under the first, non-italicized version. However, because the jury instructions were stated "in the alternative," the State was required to provide evidence to support both versions of "assault" in the instruction.]**

Defendant Ratliff's appeal focused on the second, alternative, variation of "assault," as set out in italics above. The Court of Appeals describes his argument, and explains why the argument fails, as follows:

> Ratliff contends that there was insufficient evidence to support his conviction under the common law assault instruction. He asserts that to uphold an assault conviction under this theory, the victim must have had a reasonable fear of bodily harm before the intentional act which constituted the assault occurred. He, therefore, argues that because there was no evidence that [the officer] feared that Ratliff would assault him *before* he was doused with the urine, his conviction cannot be upheld.
>
> Ratliff relies on Bland [State v. Bland], 71 Wn. App. 345 (Div. I, 1993) **[May '94 LED:15]**] for the proposition that a victim's fear after an assault occurs can never support a conviction for common law assault. Ratliff, however, misconstrues the holding in Bland. There, the defendant shot at an individual in a car. The bullet entered the window of a nearby home, shattering glass on the occupant sleeping in his living room. The jury was instructed on three alternative means of committing assault, including the same common law assault instruction given in this case. We held that the conviction could not be upheld under the common law assault theory because there was no evidence that the victim "feared future injury *after* the bullet came through his window". We concluded that common law assault require that the victim have a "fear about the *future*; a *pre*sentiment of danger".
>
> Thus, Bland does not hold that the victim's fear of future harm necessarily must occur before the act which constitutes the assault. It only holds that there must be a reasonable factual basis to support the victim's fear of future harm. At best, the victim in Bland was upset because he realized he *could* have been harmed; there was no reason for him to believe that he would be harmed in the future.
>
> Here, however, [the officer] did have a fear of future bodily harm. The urine Ratliff

> threw at him entered his eyes, ears and mouth. [The officer] testified that coming into such intimate contact with an inmate's bodily fluids made him fearful that he would contract an infectious disease, such as AIDS or hepatitis. Given present societal concerns of contracting disease from contact with bodily fluids, [the officer's] fear was not unreasonable. As a result, we conclude that there was sufficient evidence to support Ratliff's conviction for assault under the common law assault instruction, and we affirm his conviction.

[Some citations omitted; officer's name deleted; emphasis by Court]

Result: King County Superior Court conviction for custodial assault affirmed.

(8) **ASSAULT TWO -- BEER GLASS A "DEADLY WEAPON" UNDER ATTENDANT CIRCUMSTANCES** -- In State v. Shilling, 77 Wn. App. 166 (Div. I, 1995) the Court of Appeals rules that a beer glass used by Shilling to strike his victim in the head was a "deadly weapon" for purposes of the assault statute.

The Court notes that for purposes of RCW 9A.04.110(6), which defines a "deadly weapon" as any item that under the circumstances in which it is used is readily capable of causing death or substantial bodily harm, ready capability is determined in relation to the surrounding circumstances, with reference to the potential to inflict substantial bodily harm. This requirement was met under the facts of this case, the Court holds. Along the way, the Court cites the following past cases and holdings on the "deadly weapon" question:

> See also Sorenson, 6 Wn. App. 269 (1972) (penknife with 1 1/2-inch blade a deadly weapon under RCW 9.95.040 when held by perpetrator who grabbed victim by the throat and knocked victim to the floor); State v. Pomeroy, 18 Wn. App. 837 (1977) (beer bottle was a deadly weapon under RCW 9.95.040 when broken against a table by perpetrator, thrust into victim's face, and injury required removing victim's eye); State v. Thompson, 88 Wn.2d 546 (1977) (plurality decision) (open pocketknife with 2- to 3-inch blade held against neck of the victim, where victim sustained cut on neck and bruises on right arm, was a deadly weapon (RCW 9.95.040)).

[Some citations omitted]

Result: Snohomish County Superior Court convictions for second and third degree assault (one count of each) affirmed.

(9) **EVIDENCE RELATING TO ASSAULT ON OFFICER DURING ESCAPE ATTEMPT SUFFICIENT TO SUPPORT CONVICTION FOR ASSAULT IN THE FIRST DEGREE** -- In State v. Anderson, 72 Wn. App. 453 (Div. I, 1994) the Court of Appeals rejects defendant's argument that the evidence was not sufficient to support his conviction for first degree assault. The Court describes the facts as follows:

> On December 17, 1991, Anderson was being held in the King County Jail awaiting sentencing on convictions for first degree possession of stolen property and a violation of the Uniform Firearms Act. He was also subject to an institutional hold for a 1981 robbery conviction. On December 17 between 6:30 and 7 a.m.,

Timothy Bergman, a corrections officer at the King County Jail, transported Anderson from the jail to Harborview Medical Center for a medical appointment. Prior to departing for the hospital, Bergman restrained Anderson with handcuffs and a belly chain, as well as leg shackles.

During the drive to Harborview, which lasted about 5 minutes, Bergman had no conversation with Anderson. On arrival at Harborview, Bergman got out of the car and began to let Anderson out of the back seat. Bergman saw nothing unusual in the back seat and did not inspect Anderson's restraints. Anderson got out of the car, and Bergman leaned over to close and lock the door. At that point, Anderson, who had apparently been able to free himself of his restraints during the ride, "slammed" Bergman and forced him into the car's doorjamb. Bergman then felt a pressure or pulling on his gun, which was holstered and loaded. Anderson gave a couple of good jerks on Bergman's weapon before Bergman was able to jam his elbow back, strip Anderson's hand off the weapon, and get his own hand on the weapon.

As Bergman turned to face Anderson, Anderson renewed his effort to take the gun. Anderson, using both hands, was pulling on the gun and pulling Bergman's whole body forward. After wrestling for a few moments, Anderson pushed Bergman into the seat of the car and ended up on top of him. Anderson continued to grip Bergman's weapon and pull at him, and tried to strip Bergman's hand off the weapon. Realizing that Anderson had managed to free his hands from the restraints, Bergman began to shout for help, and also tried to roll over on his gun in order to "maintain" his weapon. Anderson used both hands in an effort to pull Bergman's weapon away, using such force that Bergman was ripped up off the seat. Bergman stated that a surge of fear when through him and that he feared for his life.

As the struggle continued, Bergman noticed that Anderson had a pair of handcuffs. While tugging on the gun with one hand, Anderson began hitting Bergman with the handcuffs, trying to clip them on him. After six to eight strikes, Anderson clipped Bergman's left wrist with the handcuffs. Anderson then bit Bergman's ear, and Bergman responded by biting Anderson's bicep. Bergman testified that he acted in desperation, in a last ditch effort to survive.

When Bergman bit him, Anderson let go of the gun. Bergman then pulled his gun out of his holster. Anderson immediately grabbed the barrel of the gun with both hands and shoved it up against Bergman's head. Bergman, who had his finger over the trigger guard, grabbed the gun and pushed it away and continued struggling with Anderson. After shoving the gun back up toward Anderson, Bergman fired a round, which shot up through the car windshield and grazed one of Anderson's fingers. Anderson continued to hold onto the gun until Bergman kicked him out of the car. Bergman then tried to fire his gun at Anderson, but the gun would not fire. Anderson ran across the street.

Bergman tried to fire at Anderson again as he fled, but his gun was jammed due to a "stovepipe malfunction". Anderson was able to elude Bergman, but was recaptured approximately 5 hours after his escape.

The Court explains as follows why the evidence was sufficient to support the Assault 1 conviction:

> The crime of assault in the first degree is defined as follows:
>
> > (1) A person is guilty of assault in the first degree if he or she, with intent to inflict great bodily harm:
> > (a) Assaults another with a firearm or any deadly weapon or by any force or means likely to produce great bodily harm or death;
>
> RCW 9A.36.011. The term "great bodily harm" is defined as "bodily injury which creates a probability of death, or which causes significant serious permanent disfigurement, or which causes a significant permanent loss or impairment of the function of any bodily part or organ". RCW 9A.04.110(4)(c).
>
> To establish first degree assault, intent to inflict great bodily harm must be shown. . . . In arguing that the evidence is insufficient to sustain his conviction, Anderson cites a series of cases decided under former versions of the first degree assault statute. . . .
>
> Predecessors to the current first degree assault statute required proof of intent to kill, see former RCW 9A.36.010 and RCW 9.11.010, but the present version of the statute, effective July 1, 1988, requires only an intent to inflict great bodily harm. See RCW 9A.36.011(1). Given the different intent requirements between the former and current statutes, we do not find the decisions cited by Anderson persuasive on the issue of sufficiency of the evidence here.
>
> This case involved a violent altercation initiated by Anderson, a jail inmate, against Bergman, a guard transporting him. The attack and attempted escape were obviously planned in advance by Anderson. Anderson secretly freed himself from his restraints while being transported in the police car and "slammed" Bergman into the doorjamb of the car when the opportunity arose. Anderson immediately began a vigorous and prolonged attempt to take Bergman's weapon by force, during which he bit Bergman and tried to restrain him with his own handcuffs. When Bergman drew his gun in the course of the struggle, Anderson used both hands to push the weapon toward Bergman's head. The struggle ended only after Bergman fired his weapon and kicked Anderson out of the car.
>
> Considering all the circumstances of this case, we believe a jury could conclude beyond a reasonable doubt that Anderson intended to inflict great bodily harm on Bergman. Had the jury found the evidence lacking on the intent issue, it could have convicted Anderson of the lesser included offense of second degree assault. There was sufficient evidence of Anderson's guilt of first degree assault.

[Some citations omitted]

Result: King County Superior Court convictions for first degree assault and first degree escape affirmed.

(10) **"UNLAWFUL PRACTICE OF LAW" STATUTE UPHELD, EXPLAINED** -- In State v. Hunt,

75 Wn. App. 795 (Div. II, 1994) the Court of Appeals upholds against a void-for-vagueness challenge RCW 2.48.180 which provides, in relevant part:

> Any person who, not being an active member of the state bar, . . . as by this chapter provided, shall practice law, or hold himself out as entitled to practice law, shall, except as provided in RCW 19.154.100, be guilty of a misdemeanor.

The Court of Appeals also explains in part the meaning of "practice of law":

> Although in certain situations it may be difficult to precisely define the term, "practice of law", the general definition is sufficient to allow an ordinary person to know that RCW 2.48.180 proscribes Hunt's conduct. Hunt attempted to settle claims based on negligence liability for clients. When he succeeded, his clients signed forms releasing both the tortfeasor and the insurance company from liability. Insurance companies often issued checks payable to Hunt or to his clients. When representing his clients, Hunt performed legal research and applied the results to the facts of his clients' claims, basing his demands on this application of precedent to facts, and on his analysis of the liability of the insured. When pursuing his clients' tort claims, Hunt documented past and future expense, prepared affidavits, and mailed discovery demands. He also prepared liens for those providing services to his clients. This conduct is clearly proscribed by RCW 2.48.180; Hunt could not reasonably be surprised by the application of the statute to these activities.
>
> Hunt also performed legal research and drafted, signed, and sent a letter containing several legal assertions or conclusions in response to an attorney's letter to his client. He drafted pleadings and memoranda in response to a motion to modify support; the client filed them, purportedly acting pro se. These actions are also clearly proscribed by the statute.
>
> Hunt also prepared dissolution documents, actually interceding for one dissolution client during a court hearing. Washington law clearly prohibits an unlicensed person from selecting and completing legal forms for another, necessarily including dissolution forms.

[Citations omitted]

Result: affirmance of Kitsap County Superior Court convictions for unlawful practice of law (12 counts), unlicensed operation as a collection agency (3 counts) and second degree theft (1 count).

(11) **INSURANCE COMPANY ENTITLED TO RESTITUTION FROM JUVENILE OFFENDER** -- In State v. Sanchez, 73 Wn. App. 486 (Div. III, 1994) the Court of Appeals holds that an insurance company which has reimbursed its insured party (the victim) for damages caused by a juvenile offender qualifies as a "person" entitled to a restitution order from the juvenile court. The Sanchez Court relies in part on a precedent in which a Washington court had made a similar holding under the statutes imposing restitution obligations on adults. See State v. Barnett, 36 Wn. App. 560 (Div. I, 1984). Result: Yakima County Superior Court adjudication of guilt and order of restitution affirmed.

(12) **RESTITUTION FOR LOST WAGES ONLY IF LOSS DUE TO VICTIM'S PHYSICAL INJURY** -- In State v. Hefa, 73 Wn. App. 865 (Div. I, 1994) the Court of Appeals rules that the juvenile law provisions, just like the adult criminal law provisions (see State v. Goodrich, 47 Wn. App. 114 (1987)), provide for restitution for a crime victim's lost wages only if his wage loss is due to physical injury to the victim. Accordingly, in this case where the loss of wages was due to the burglary victim's need to stay home from work to make repairs and secure his home, among other things, no restitution could be ordered for the lost wages. Result: that portion of a King County Superior Court order requiring that a juvenile offender pay restitution for lost wages reversed.

(13) **K-9 SNIFF OF VEHICLE AND OTHER EVIDENCE JUSTIFY SEIZURE AND FORFEITURE OF VEHICLE UNDER RCW 69.50.505 --** In Adams County v. 1978 Blue Ford Bronco, 74 Wn. App. 702 (Div. III, 1994) the Court of Appeals rejects a vehicle owner's challenge to forfeiture of her vehicle under the controlled substances law, RCW 69.50.505.

E. Hope Gonzalez challenged forfeiture of her vehicle, arguing that the sheriff's office was hinging its case for forfeiture of her Ford Bronco on the fact that a drug-sniffing K-9 (admittedly accredited and trained to do the job) had alerted on her vehicle even though no drugs were found in the vehicle following the alert. The Court of Appeals rules that there was probable cause to seize the vehicle under the following facts:

1. Several days earlier, Ms. Gonzalez had told a confidential informant that she had to go to Oregon to get the quantity of cocaine he wanted to purchase.

2. Thereafter, police said, Ms. Gonzalez did not answer the telephone at her residence for several days, and the Bronco, her only operational vehicle, was missing from the premises.

3. When police spotted Ms. Gonzalez back in town again, the confidential informant called her and arranged to meet her outside her house to pick up the cocaine.

4. At the arranged transfer time, law enforcement officers arrested Ms. Gonzalez, and, with the help of the K-9, found 7 ounces of cocaine in a box which Ms. Gonzalez had been holding when the officers arrested her.

5. The K-9 alerted to something in the luggage compartment of the Bronco, but the officers could find nothing. (The dog's handler later testified that the dog can detect the presence of narcotics in amounts too small to be seen by the human eye and can smell the odor of narcotics even after the removal of narcotics from an area.)

The Court of Appeals holds that these facts provided PC to seize the vehicle under RCW 69.50.505. While an alert which does not lead to discovery of narcotics will not, alone, provide PC for seizure, such an alert is a factor to be considered with the other facts of the case, the Court explains.

Result: Adams County Superior Court seizure and forfeiture order affirmed.

LED EDITOR'S COMMENT: Criminal defense attorneys may try to argue that language in the Court of Appeals opinion in this case supports the proposition that a K-9 drug alert, alone, is not probable cause to seize or to search. That is not so. Probable cause to

search or to seize can be established by a K-9 alert alone under appropriate circumstances. See for example, State v. Wolohan, 23 Wn. App. 813 (Div. III, 1979) Nov. '79 LED:05. The decision in the Adams County case stands only for the proposition that, in the absence of corroborating evidence, probable cause to seize a vehicle for forfeiture purposes is not established by a K-9 drug alert, where that drug alert is followed up by a search yielding no drugs.

(14) **COURT'S DISMISSAL OF DRUG CHARGE BASED ON PROSECUTOR REFUSAL TO IDENTIFY CI AFFIRMED** -- In State v. Petrina, 73 Wn. App. 779 (Div. II, 1994) the Court of Appeals upholds a trial court dismissal of a drug case following the prosecutor's refusal to identify a confidential informant (CI).

An affidavit for a search warrant alleged that the CI had observed the defendant's adult son visit his father's house and place marijuana in a safe in the basement of the house. The affidavit also alleged that the CI claimed that the father knew about his son's use of the father's place as a "safe" house. After a search under a warrant yielded marijuana in other locations in the basement, but an empty safe smelling of marijuana, the father was charged under the UCSA.

After a pre-trial suppression hearing, the trial court ruled that the CI's identity was critical to the father's effort to prove his innocence, and the trial court ordered the prosecutor to disclose the identity of the CI, on pain of dismissal of the case. The prosecutor refused to identify the CI, and the case was dismissed.

The Court of Appeals agrees with the trial court, noting that whether constitutional concepts of fairness require the State to identify a confidential informant depends upon the facts of each case. The public interest in protecting the flow of information must be balanced against a criminal defendant's right to prepare a defense, including the right to compel the attendance of a material witness. If, after considering the crime charged, the possible defenses, the possible significance of the informant's testimony, and any other relevant factors, the trial court determines that disclosure of the informant's identity is relevant and helpful to the defense, or is essential to a fair determination of the defendant's guilt, the trial court must order disclosure and dismiss the action if the State refuses to disclose.

Here, the Court of Appeals concludes that, based on the affidavit, the CI was obviously an eyewitness who could testify who put the drugs in the safe, who else was present, and what other activities were observed at the time. This evidence would go to the father's guilt or innocence of possession of the drugs, the Court holds.

The Court of Appeals concludes by asserting that there is no requirement that the trial court hold an in camera hearing to question a CI when the trial court determines from a warrant affidavit that the CI clearly has information going to the guilt or innocence of the accused.

Result: Grays Harbor County Superior Court order dismissing charges affirmed.

(15) **HEARSAY, CONSTRUCTIVE POSSESSION ISSUES RESOLVED AGAINST DEFENDANT IN DRUG CASE WHERE OFFICER EXECUTING SEARCH WARRANT ANSWERED THE PHONE** -- In State v. Collins, 76 Wn. App. 496 (Div. I, 1995), the Court of Appeals rejects a drug case defendant's challenges to (A) admission of certain out-of-court statements, and (B) to the sufficiency of the evidence to convict him of illegal possession of drugs.

(1) Admissibility of out-of-court statements

During the execution of a search warrant for cocaine, a detective answered several phone calls from persons either asking for Larry or for merchandise or for both. The Court of Appeals rules that the trial court properly admitted the detective's testimony recounting the phone conversations. Under the Evidence Rules, the inquiries were not "hearsay" either: (1) because they were inquiries, not assertions; or (2) because the purpose of the State's offering of the evidence was not to show the truth of matters asserted or implied. Rather, the Court of Appeals points out, the State offered the evidence only to show that the callers had an implied belief that drugs could be found at the location called.

(2) Sufficiency of evidence of possession

The Court of Appeals rules that the evidence was sufficient to convict Collins of possession with intent to deliver under either of two theories. First, there was sufficient evidence of his "constructive possession" of the cocaine found in the apartment. This ruling was based on: (a) Collins' temporary residence there, (b) the presence of his personal possessions there, (c) his knowledge of the presence of the drugs there, and (d) the callers' inquiries seeking him there. Second, the Court of Appeals declares that, alternatively, there was sufficient evidence that Collins was an accomplice to the other resident at the apartment in the possession of the drugs. His presence at the apartment, his knowledge of the presence of the drugs, and his involvement in the drug activity (as evidenced by the calls) was sufficient to establish accomplice liability, the Court holds.

Result: affirmance of King County Superior Court conviction for possession of a controlled substance with intent to deliver.

LED EDITOR'S COMMENT: The ruling on the "hearsay" issue in Collins suggests to us that most testimony about statements made by persons calling a drug house during warrant execution will survive a "hearsay" challenge. It also appears that there is no statutory constitutional privacy restriction on police taking such calls during warrant execution. See State v. Goucher, 124 Wn.2d 778 (1994) Dec. '94 LED:14.

(16) **FELONY ELUDING DOESN'T INCLUDE "INTENT" ELEMENT; ALSO "NECESSITY" NOT A DEFENSE TO THE CRIME --** In State v. Gallegos, 73 Wn. App. 644 (Div. I, 1994) the Court of Appeals rejects defendant's arguments: (1) that the felony-eluding statute, RCW 46.61.024, requires proof of intent to elude; and (2) that he should have been allowed by the trial court to argue the defense of "necessity". Defendant claimed at trial that he led police on a high-speed chase so that he could go without delay to the rescue of a friend in trouble, and with the intent that police would follow him to the trouble spot and would then aid his friend.

(1) "Intent" Element

On the issue of whether there is an intent element in the eluding statute, the Court of Appeals begins its analysis by quoting from RCW 46.61.024, which reads in part:

> Any driver of a motor vehicle who wilfully fails or refuses to immediately bring his vehicle to a stop and who drives his vehicle in a manner indicating a wanton or

> wilful disregard for the lives or property of others while attempting to elude a pursuing police vehicle, after being given a visual or audible signal to bring the vehicle to a stop, shall be guilty of a class C felony.

The Court then quotes from an earlier decision in State v. Stayton, 39 Wn. App. 46 (Div. II, 1984) to explain the elements of the crime of eluding:

> The first element [of RCW 46.61.024] is that a uniformed police officer whose vehicle is appropriately marked must give the potentially errant driver of a motor vehicle "a visual or audible signal to bring the vehicle to a stop . . ." Next, the driver must be a person who "wilfully fails or refuses to immediately bring his vehicle to a stop . . ." The willful failure to do so implies knowledge that a signal has been given. The third element is that, "while attempting to elude a pursuing police vehicle," the driver "drives his vehicle in a manner indicating a wanton [or] wilful disregard for the lives or property of others. . ." All three elements must occur in sequence before the crime has been committed.

The Court concludes by explaining that, even though the word "attempt" is included in the "eluding" statute, this word is used in the ordinary sense of "to try" and not in the statutory sense of "substantial step and intent" (see chapter 9A.28 RCW). Accordingly, intent is not an element of the crime, the Court concludes.

(2) "Necessity" Defense

On the issue of whether Gallegos should have been allowed to argue the common law defense of "necessity", the Court of Appeals explains:

> The necessity defense is available to a defendant when the physical forces of nature or the pressure of circumstances cause the accused to take unlawful action to avoid harm which social policy deems greater than the harm resulting from a violation of the law. The defense is not applicable where the compelling circumstances have been brought about by the accused or where a legal alternative is available to the accused.
>
> The "pressure" must come from the physical forces of nature, not from other human beings, for a defendant to argue the necessity defense. **[LED EDITOR'S COMMENT: This purported restriction on the "necessity" defense, well-supported by the Gallegos Court with citations not provided in the LED, is not consistently articulated by the Washington courts, e.g., see Jeffrey case in this LED above at page 6.** In addition, . . . the defendant must prove by a preponderance of the evidence that (1) he or she reasonably believed the commission of the crime was necessary to avoid or minimize a harm, (2) the harm sought to be avoided was greater than the harm resulting from a violation of the law, and (3) no legal alternative existed.
>
> Here, the alleged "pressure" under which Gallegos acted resulted not from a physical force of nature but from his friend's need for assistance. Therefore, as a matter of law, the defense of necessity was not available to Gallegos. Further, even if the defense had been available, Gallegos failed to present sufficient

> evidence to raise it despite testimony about the objective events preceding Gallegos' arrest. His belief that he had to flee from Officer Adams so the officer would follow him and help him assist Keating was unreasonable. Simply waiting a few minutes and informing Officer Adams about the situation would have allowed the officer to take action necessary to find Keating and protect her. Also, Gallegos failed to show that the possible harm to Keating was any greater than the danger in which he placed other drivers due to his reckless driving. Finally, Gallegos had the legal alternative of asking the officer to use police resources to locate and assist Keating. Because, as a matter of law, the necessity defense was unavailable and because Gallegos failed to prove by a preponderance of the evidence the three prerequisites to the defense, the trial court properly exercised its discretion to exclude irrelevant and cumulative evidence. It follows that it was not error to refuse to instruct the jury on necessity.

Result: King County Superior Court conviction for attempting to elude a pursuing police vehicle affirmed.

(17) **MEDICAL RECORDS ADMITTED UNDER "BUSINESS RECORDS" EXCEPTION TO HEARSAY RULE** -- In State v. Garrett, 76 Wn. App. 719 (Div. I, 1995) the Court of Appeals rejects defendant's hearsay challenge to admission of medical records into evidence in his child rape case. The 3 1/2 year-old victim's treating physician, Dr. Naomi Sugar, had been allowed by the trial court to testify regarding the factual assertions in the report of Dr. Susan Omura, an emergency room doctor who saw the victim the morning after the sexual assault.

The "Uniform Business Records As Evidence Act," RCW 5.45.020, provides:

> A record of an act, condition or event, shall in so far as relevant, be competent evidence if the custodian or other qualified witness testifies to its identity and the mode of its preparation, and if it was made in the regular course of business, at or near the time of the act, condition or event, and if, in the opinion of the court, the sources of information, method and time of preparation were such as to justify its admission.

The Court of Appeals declares that medical records are admissible as "business records" under this statute if the following circumstances exist: (1) the records were created at or near the time of treatment; (2) the records became part of the patient's common medical file; and (3) the records are shown to be reliable through the testimony of a physician who explains that he or she: (a) is familiar with the examination and testing procedures used by the other physician, and (b) routinely relies on such records in treating patients. The Garrett Court holds that the emergency room medical records were properly admitted based on Dr. Sugar's testimony. The Court rejects defendant's argument that the records would be admissible only if Dr. Sugar were Dr. Omura's supervisor.

Result: King County Superior Court conviction for first degree rape of a child affirmed.

(18) **EXPERT TESTIMONY NOT ALWAYS NECESSARY TO PROVE THAT A RAPE 2 VICTIM LACKED MENTAL CAPACITY TO CONSENT TO SEX** -- In State v. Summers, 70 Wn. App. 424 (Div. I, 1993) the Court of Appeals rejects defendant's argument that in a prosecution for second degree rape under RCW 9A.44.050(1)(b), the testimony of an expert is always necessary to prove

that the victim lacked the mental capacity to consent to sexual intercourse. The Court holds instead that if nonexpert testimony is sufficient to permit a rational finding by the trier of fact that the victim was unable to comprehend the nature or consequences of sexual intercourse, no expert testimony on the victim's inability to consent is needed. In this case, the victim was quite mentally deficient as evidenced in her testimony. Her testimony demonstrating that fact was sufficient evidence of lack of mental capacity to consent to sex to support the rape conviction, the Court rules. Result: King County Superior Court conviction for second degree rape affirmed. **LED EDITOR'S COMMENT: We don't believe it is common practice to try a rape case on the mental incapacity theory without expert testimony. It seems to be a big risk to do so.**

(19) **NO INHERENT AUTHORITY TO ORDER FORFEITURE OF "DERIVATIVE CONTRABAND"** -- In State v. Alaway, 64 Wn. App. 796 (Div. II, 1992) the Court of Appeals reverses a trial court decision that the trial court had inherent authority to order forfeiture of tools, building materials and gardening supplies which had been used to grow marijuana.

Alaway had pleaded guilty to the charge of manufacturing marijuana and had been sentenced. Then, instead of pursuing statutory forfeiture under RCW 69.50.505, the State had asked the trial court to order forfeiture as part of the criminal proceedings. The Court of Appeals notes that the equipment was not contraband in that it was lawful to possess. Therefore, the trial court's authority to refuse return of contraband was not implicated in this case.

Turning to the State's "derivative contraband" theory, the Court of Appeals holds that where the State lawfully seizes property solely because of its use in committing a crime (rather than as contraband per se), the State's forfeiture authority is wholly statutory. Because the statutory procedures set forth in RCW 69.50.505 were not followed in this case, the trial court was without authority to issue the forfeiture order.

Result: Pacific County Superior Court order of forfeiture reversed; property ordered returned to Alaway. **[LED EDITOR'S NOTE: This is an "old" case whose significance we had overlooked when the decision was issued in 1992.]**

(20) **"FAILURE TO PROTECT" CIVIL LIABILITY CASE MUST GO TO JURY --** In Noakes v. Seattle, 77 Wn. App. 694 (Div. I, 1995) the Court of Appeals rules that the trial court erred in dismissing a civil lawsuit against the City of Seattle for "failure to protect" two developmentally disabled persons from an intruder. The facts and evidence presented to the trial court are summarized by the Court of Appeals as follows:

> Shortly before 1 a.m. on March 18, 1990, Shirley and Marie, both developmentally disabled, were beaten and raped in their home by William Jimerson. Before, and as, Jimerson broke into the home, Shirley or Marie called 911 on three separate occasions within a 9-to 11-minute period. Each time one of them called, a 911 operator told Shirley or Marie that police would be sent out, or would be sent as soon as possible. In the first call, after being questioned as to whether she was drunk *[COURT'S FOOTNOTE: Shirley has a speech impediment which led the 911 operators to mistakenly suspect that she was intoxicated.]*, an obviously upset Shirley was told by the 911 operator, "We're broadcasting this information" and, almost immediately thereafter, "We'll send someone out". During the second call a 911 operator told Shirley that it had her call as a "waiting call" and stated, "We'll get somebody down there just as soon as we can get a unit available. We've got

about fifteen waiting calls. . . . We'll get somebody by just as soon as we can." A few minutes later Marie called 911 and stated she didn't care who 911 sent, "somebody, anybody, even a medic". She indicated the prowler was breaking the bedroom window and was about to enter the house. Later in the conversation Marie indicated the prowler was *in* the house. The 911 operator (a different one from the others) again asked if the caller (Marie) had been drinking. She explained that she had not been drinking, but she was scared.

Approximately 30 minutes after the last of these three calls, a 911 dispatcher called the Noakes' residence to see if they were still in need of help. Because Jimerson was present, threatening them, had already raped at least one of them, and was acting "out of his mind", Shirley reported the prowler had gone and the call could be canceled. There is no transcript of this call in the record. Approximately 1 to 1 1/2 hours later, Marie was able to run to a neighbor's house and called 911 again. When the police did not arrive, the neighbor called 911 and told the dispatcher there was a man in the Noakes' house, Marie was injured, and Shirley was still in the house with the intruder. Shortly thereafter, police arrived. Jimerson was found and arrested.

Jimerson was charged and convicted of rape and assault of the two women. Shirley and Marie sued the City for damages due to its negligence and failure to respond to their 911 calls. The City brought on a motion for summary judgment requesting dismissal. The City claimed in one of its defenses that it was protected from liability by the public duty doctrine, and that the Noakes did not fit into any exception to this doctrine.

In response, the Noakes presented the affidavit of a police expert, retired Bellevue Chief of Police D.P. Van Blaricom, and their own affidavits. Van Blaricom opined that the police should and could have done more to get assistance to the Noakes, that it improperly classified the call as being of lesser importance, and that the police had given specific assurances of assistance to them. The affidavits of Shirley and Marie opined that the facts supported their claim that the 911 operator gave express assurances to them of police assistance and that they relied on this assistance in order to prevent them from being harmed or taking other possible action.

The Court of Appeals holds that this evidence was sufficient to require that the Noakes' case go to a jury under the "express assurance" exception to the "public duty doctrine," a doctrine that ordinarily bars a suit against the police for failure to protect.

Result: King County Superior Court decision dismissing lawsuit reversed; case remanded for trial.

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BRIEF NOTE FROM THE U. S. DISTRICT COURT, WESTERN DISTRICT OF WASHINGTON

SEXUAL PREDATOR LAW RULED UNCONSTITUTIONAL; STATE APPEALS -- In Young v. Weston, Case No. C94-480C the United States District Court for the Western District of Washington (Judge Coughenour) has ruled on (1) due process, (2) ex post facto and (3) double

jeopardy grounds that Washington's "Sexually Violent Predator Act" at chapter 71.09 RCW is unconstitutional. The State has appealed to the Ninth Circuit of the United States Court of Appeals and has won a stay to the release of Mr. Young pending that appeal. The Washington State Supreme Court had previously ruled that the Act is constitutional. See In re Young and In re Cunningham, 122 Wn.2d 1 (1993) **Dec. '93 LED:17**.

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NEXT MONTH

The November '95 LED will include, among other things: (1) an entry on the recent 9th Circuit U.S. Court of Appeals decision in U.S. v. Cretacci, 57 CrL 1451 (9th Cir. 1995), in which the Court rules that if a defendant does not contest the civil forfeiture of his property, the unchallenged forfeiture does not constitute "punishment" under federal constitutional double jeopardy protections; (2) an entry on the recent State Supreme Court decision in State v. Rogers, 127 Wn.2d 270 (1995), in which the Court rules that DOL can rely exclusively on its "address of record" and on its "change of address" requirements in mailing a notice of revocation of a driver's license; (3) a collection of citations to cases from other jurisdictions holding that double jeopardy protections are not implicated where one driver's license is suspended or revoked for DUI and one is then prosecuted for DUI (or vice versa); and (4) update notes on the 1995 amendments to the implied consent DUI laws.

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CORRECTION NOTE RE SEPTEMBER LED

In the Table of Contents of the September LED, we indicated that there was an entry with some information on the 1995 DUI law changes. There was no such entry. Early in the editing process for the September LED, we had decided against creating such an entry, but we failed to delete the "Table of Contents" reference. Our apologies.

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The Law Enforcement Digest is edited by Assistant Attorney General, John Wasberg, Office of the Attorney General. Editorial comment and analysis of statutes and court decisions express the thinking of the writer and do not necessarily reflect the opinion of the Office of the Attorney General or the Washington State Criminal Justice Training Commission. The LED is published as a research source only and does not purport to furnish legal advice.